2-24-2015

Huber v. Lightforce USA, Inc. Appellant's Brief Dckt. 41887

IN THE SUPREME COURT OF THE STATE OF IDAHO

JEFFREY EDWARD HUBER, an individual, Plaintiff-Appellant, vs. LIGHTFORCE USA, INCORPORATED, a Washington corporation, doing business as NIGHTFORCE OPTICS, Defendant-Respondent.	**SUPREME COURT NO. 41887-2014**

APPELLANT'S OPENING BRIEF

Appeal From The District Court Of The Second Judicial District
In And For The County Of Clearwater
District Court Case No. CV-2012-336

Honorable Michael J. Griffin, District Judge, Presiding

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TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Cases

Federal Statutes:

State Statutes:

State Rules:

Other Authorities:

I.
STATEMENT OF THE CASE

A. Nature of the Case.

This appeal involves claims brought by Jeffrey E. Huber ("Huber") against his former employer, Lightforce USA, Incorporated ("LFUSA"), for breach of contract and failure to pay wages under a document entitled Deed of Non Disclosure, Non Competition And Assignment [Ex. P-22[1/]] ("Employment Contract")[2/]; and for breach of and failure to pay amounts due Huber under a document entitled Company Share Offer [Ex. P-1] ("CSO"), which is governed by the Employee Retirement Income Security Act ("ERISA"). This appeal involves the District Court's erroneous award of attorneys' fees and costs in the amount of $268,000.00 to LFUSA, even though LFUSA was found to have breached the Employment Agreement and Huber was awarded a judgment against LFUSA in the amount of $180,000.00, plus prejudgment interest. This appeal also involves the District Court's denial of attorneys' fees and costs to Huber.

B. Proceedings Before The District Court.

On or about August 27, 2012, Huber filed his Complaint in the Second Judicial District of the State of Idaho, in and for the County of Clearwater, Case No. CV 12-336, alleging claims against LFUSA for breach of contract, breach of the Idaho Claims For Wages Act, and breach of the covenant of good faith and fair dealing. Record ("R.") 18-26. On October 3, 2012, LFUSA filed its Answer to Complaint denying Huber's claims. R. 30-36. On May 29, 2013, Huber filed an Amended Complaint alleging claims under ERISA [pursuant to 29 U.S.C. 1132(a)(1)(B)] and for

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1/ Record designations herein to Trial Exhibits refer to "P"—Plaintiff Huber and "D"—Defendant LFUSA.

2/ In the Record and the District Court's findings, the "Deed" is referred to as an "NDA," but the document is actually an "employment contract" and more properly referred to herein as such.

wrongful termination. R. 192-206. On June 7, 2014, LFUSA filed an Answer to Amended Complaint denying Huber's claims. R. 207-216.

On July 2, 2013, Huber filed a motion for partial summary judgment. R. 221-353. As a result of that motion, the District Court ruled that: (1) the CSO was governed by ERISA; (2) any compensation due Huber under the terms of the Employment Contract was not "wages" under Idaho's Claims For Wages Act, Idaho Code §§ 45-601, *et seq.* ("Wages Act"); and (3) any amount owed Huber under the Employment Contract was not subject to trebling pursuant to Idaho Code § 45-615. R. 675-680.

On August 20, 2013, LFUSA filed a motion for partial summary judgment. R. 621-644. As a result of that motion, the District Court ruled that: (1) Huber could not maintain a cause of action against LFUSA for breach of contract/wrongful termination based upon the LFUSA Employee Manual; and, (2) the CSO was a "top hat plan" under ERISA. R. 1219-1227. The District Court ruled that, because the CSO was a "top hat plan," it was not subject to ERISA's vesting/anti-forfeiture, funding or fiduciary provisions. R. 1219-1227. The District Court also ruled that, because the CSO was a "top hat plan," any amount owed Huber under the CSO could be forfeited pursuant to the terms of the CSO if LFUSA proved it had terminated Huber's employment for "unsatisfactory performance." *Id.*

The case proceeded with a court trial held from October 21, 2013 through October 30, 2013. On December 10, 2013, the District Court issued its Findings of Fact and Conclusions of Law ("12.10.13 Findings/Conclusions"). R. 1409-1421. Without citing a single case or statute to support its legal conclusions, the District Court ruled that:

1. Huber's employment with LFUSA began in the late 1990s and was terminated on August 1, 2012 (in excess of 20 years) [R. 1409, 1423];

2. The Employment Contract commenced upon execution by the parties on February 7, 2011 [R. 1415];

3. Huber complied with all of the terms of the Employment Contract [R. 1416]

4. Huber's employment with LFUSA was not terminated based upon a "summary dismissal," as defined in the Employment Contract [R. 1416]

5. Huber's employment with LFUSA was not terminated for "performance issues," as defined in the Employment Contract [R. 1416];

6. A reasonable person would not find Huber's work performance during the time period covered by the Employment Contract (February 7, 2011 to August 1, 2012—the last 18 months of Huber's employment with LFUSA) was unsatisfactory or substandard [R. 1416-1417];

7. LFUSA breached the Employment Contract [R. 1417]; and

8. Huber was entitled to $180,000.00 pursuant to the Employment Contract [R. 1417].

With regard to the CSO, the District Court ruled that:

9. The CSO was a defined compensation plan governed by ERISA [R. 1417];

10. The CSO was a "top hat plan" because Huber was a "top hat" employee, and because there were no dedicated funds available for paying Huber under the CSO which could not be reached by general creditors of LFUSA [R. 1417];

11. Because the CSO was a "top hat plan," Huber's right to receive the compensation owed to him under the CSO was subject to forfeiture if he voluntarily left his employment with LFUSA or his employment was terminated for unsatisfactory performance [R. 1417];

12. Huber did not leave his employment voluntarily [R. 1418];

13. "A reasonable person would find that Huber's actions as vice president (failing to address production issues), management style, demeanor and unprofessional treatment of LFUSA employees collectively amounted to unsatisfactory performance" [R. 1419] (emphasis added);

14. LFUSA did not terminate Huber's employment to avoid paying compensation under the CSO [R. 1419-1420];

15. Because Huber's employment with LFUSA was terminated for unsatisfactory performance, Huber forfeited any compensation owed him under the CSO [R. 1420]; and

16. Because Huber had not pled "equitable relief," he was not entitled to equitable relief [R. 1420].

On December 10, 2013, the District Court entered a Judgment in favor of Huber in the amount of $180,000.00. R. 1422-1423.

On December 23, 2013, Huber filed his: (1) motion to amend pleadings to conform to the evidence under Rule 15(b) of the Idaho Rules of Civil Procedure ("I.R.C.P.") [R. 1492-1496]; (2) motion for amendment pursuant I.R.C.P. 52(b) and I.R.C.P. 59(a) [R. 1765-1775]; and (3) motion to amend judgment to include prejudgment interest [R. 1481-1486]. Huber also filed a motion for attorneys' fees and costs supported by declarations. R. 1428-1480.

On December 24, 2013, LFUSA filed its memorandum of fees and costs supported by declarations. R. 1500-1762. Both parties filed motions to disallow the other's claimed attorneys' fees and costs. R. 1798-1803.

On January 21, 2014, the District Court entered its Findings Re: Post Trial Motions ("Post-Trial Findings"). R. 1979-1987. The District Court (1) denied Huber's motion to amend to conform with the evidence under I.R.C.P. 15(b) [R. 1986]; (2) denied Huber's motion to amend the 12.10.14 Findings/Conclusions [R. 1986]; (3) granted Huber's motion to amend the Judgment to add prejudgment interest and awarded $7,752.58 in prejudgment interest [R. 1986]; (4) denied Huber's motion for attorneys' fees and costs [R. 1986]; and, (5) granted LFUSA's motion for attorneys' fees and costs and awarded LFUSA $264,000.00 in attorneys' fees, $15,584.51 in costs as a matter of right, and $4,880.25 in discretionary costs [R. 1986].

On January 21, 2014, the District Court entered an Amended Judgment in Huber's favor in the amount of $187,752.38 [R. 1990-1991]; and an Order For Costs and Attorney Fees awarding LFUSA $284,464.76 [R. 1988-1989].

On September 30, 2014, in an effort to comply with I.R.C.P. 54(a), the District Court entered a Second Amended Judgment offsetting Huber's Amended Judgment and the award of attorneys' fees and costs to LFUSA, and entering a final judgment to LFUSA in the amount of $94,119.85. R. 2095-2096.

C. **Statement Of Facts**.

Lightforce Australia ("LFA") is owned by Ray Dennis ("Dennis"). Transcript ("Tr."), Volume ("V.") 6, p. 1115, l. 1-p. 1116, l. 20. LFA is an Australian company and operates out of Australia. *Id.* LFA manufactures spotlights for hunting at night. *Id.* In 1991, Dennis expanded his business to the United States and formed LFUSA. Tr.V. 6, p. 1115, l. 1—p. 1116, l. 20. LFUSA was initially located and incorporated in the State of Washington. Tr.V. 6, p. 1117, ll. 1-18. From its inception, Dennis has been the only owner and President of LFUSA. After LFUSA was formed, in addition to selling lighting manufactured in Australia, it began re-selling rifle scopes purchased from other manufacturers. Tr.V. 2, p. 135, l. 10-p. 136, l. 10.

Huber began working for LFUSA in 1991. Tr.V. 2, p. 134 l. 17—p. 135, l. 15. He was hired by Denny Griffin, LFUSA's manager. Tr.V. 2, p. 130, l. 18—p. 135, l. 15. When Huber was hired by LFUSA in 1991, he was 20 years old and had no college education. Tr.V. 2, p. 130, ll. 1-21; p. 136, ll. 14-16. In or about 1995, Dennis fired Denny Griffin. Tr.V. 6, p. 117, l. 24—p. 1118, l. 4. Huber remained as LFUSA's only employee until Dick Salvino and Kevin Stockdill were hired in or about 1995-1996. Tr.V. 2, p. 154, l. 4—p. 164, l. 13. In 1995, Huber became LFUSA's Vice President. R. 1409-1421. Huber ran LFUSA's day-to-day operations; Dennis lived in Australia and would only visit LFUSA two or three times a year. Tr.V. 2, p. 159, l. 23—p. 160, l. 7; p. 179, l. 19—p. 180, l. 12.

In 2000, a decision was made to relocate LFUSA from Washington to Orofino, Idaho. R. 1220. At that time, LFUSA had four employees. Tr.V. 2, p. 178, ll. 11-14. Huber was in charge of and coordinated the entire move, including obtaining new facilities for LFUSA to operate from. Tr.V. 2, p. 252, l. 10—p. 259, l. 13; R. 1410. LFUSA occupied a rental building in Orofino for approximately one year while Huber oversaw the construction of a permanent facility. Tr.V. 2, p. 256, l. 1-p. 266, l. 18. In 1992, after LFUSA's new facility in Orofino was completed, LFUSA moved-in and began operations, and it continues to operate out of that facility today. Tr.V. 2, p. 266, l. 18-p. 270, l. 18. Since 1995, LFUSA's primary business is the invention, manufacture and sale of high precision rifle scopes for hunting, military uses and target competition. Ex. P-131. LFUSA sells worldwide and its scopes are marketed under the trade name "Nightforce Optics." *Id.*

Prior to LFUSA's relocation effort in 2000, Huber requested a salary increase from Dennis. Tr.V. 2, p. 241, l. 1-p. 250. In response to Huber's request, Dennis drafted and offered Huber the CSO. *Id.*; Ex. P-1, NFO0697-98. By its terms, the CSO was to provide additional compensation to Huber for his work for, and loyalty to LFUSA. *Id.* The CSO was signed October 9, 2000. *Id.* The CSO provided that Huber would receive 5% of the "goodwill" of LFUSA each year for 6 years beginning in 2000, with a maximum accumulation of 30%. *Id.* The terms of the CSO, among other things, required LFUSA to purchase an insurance policy in the value of $1,000,000.00, from which Huber would be paid "***via*** **this insurance policy using his goodwill value.**" *Id.* (emphasis added). The CSO provided that if Huber were to retire at a reasonable age and no sale of the business was pending, he would be given the option of exchanging his accumulated goodwill for shares in the company. *Id.* The CSO did not require Huber to exchange the value of his goodwill for company stock or for any other general company assets. *Id.* The CSO also included a provision that all goodwill would be lost should Huber leave voluntarily or if his employment was terminated due to unsatisfactory performance. *Id.*

In September 2003, after execution of the CSO, LFUSA, through Huber, purchased a $1,000,000.00 term life insurance policy on Huber's life, Farm Bureau Policy No. 1134385 ("Policy"). Ex. D-9, NFO20206-240; R. 1410, 1417. The terms of the Policy designated LFUSA as the owner and a 50% beneficiary, Huber's parents as a 50% beneficiary, and expressly provided that "payments under any payment option will be exempt from the claims of creditors to the maximum extent allowed by law." Ex. D-9, pp. 3, 9, NFO20208, 20214.

On July 25, 2006, after Huber had earned 25% of the "goodwill" in LFUSA (he earned the entire 30% as of October 2006), LFUSA, through Huber and Farm Bureau, amended the Policy ("Amended Policy"). Tr.V. 6, p. 1055, l. 22—p. 1057, l. 9; R. 1410, 1417; Ex. D-135, FB0001-34. Under the Amended Policy, LFUSA remained the owner of the original Policy, but the total value of the Policy was reduced to $750,000.00. *Id.*; Ex. D-135, FB0020. The balance of the Policy

($250,000.00) was converted into a new, guaranteed whole life cash value policy that designated Huber as the owner, Policy No. 1231959 ("New Policy"), and named Lori Huber (Huber's wife) as a 50% beneficiary of the death benefit and LFUSA as a 50% beneficiary of the death benefit. Tr.V. 6, p. 1060, ll. 18-20; Ex. D-135, FB0021. The terms of the New Policy provided that it would accumulate cash value that was available to Huber upon surrender of the New Policy. Tr.V. 6, p. 1056, ll. 11-19 (Testimony of Insurance Agent, Mike Asker); Ex. D-135, FB0024. The New Policy guaranteed a cash value of at least $136,308.00 to Huber when he reached age 65. Ex. D-135, FB0029.

At trial, the evidence established that the cash value of the policy was available to Huber if Huber left the company. Tr.V. 6, p. 1056, ll. 11-19.[3/] Dennis testified that the purpose of the insurance policy was to comply with LFUSA's obligations under the CSO. Tr.V. 6, p. 1131, ll. 8-23.

Huber worked for LFUSA from 1991 until August 1, 2012 when his employment was terminated. Tr.V. 2, p. 250, ll. 7-13; R. 1410-1411. During his years with LFUSA, Huber expanded LFUSA from a small company with 3 employees to a company that: (1) employed approximately 60 people [Tr.V. 2, p. 272, ll. 13-25]; (2) owned impressive manufacturing and sales facilities in Orofino, Idaho; (3) included numerous product lines (many of which Huber invented); (4) had sales worldwide; (5) possessed lucrative military contracts secured by Huber [Tr.V. 2, p. 191, l. 20—p. 196, l. 19]; and, (6) had a value in excess of $24,000,000.00 and goodwill in excess of $11,000,000.00 [Tr.V. 3, p. 430, l. 3—p. 434, l. 13]. R. 1411. Huber invented many of LFUSA's product lines that are still sold today. Tr.V. 2, p. 162, l. 2—p. 164, l. 13; p. 172, l. 18—

3/ Ultimately, after Huber's employment was terminated, the Amended Policy was canceled by LFUSA and the accrued cash value of $14,334.29 was paid by the insurance carrier to Huber. Huber returned that amount to LFUSA *via* cashier's check. Ex. D-6.

p. 174, l. 22; p. 175, l. 5—p. 176, l. 23; p. 181, l. 13—p. 191, l. 5; p. 197, l. 2—p. 202, l. 15; p. 202, l. 16—p. 226, l. 18; p. 227, l. 10—p. 239; l. 12; Ex. P-103 (LFUSA 2013 Catalog).

In early 2010, Huber's relationship with LFUSA and the company's Board of Directors ("Board") soured.[4/] Monika Sherratt ("Sherratt") was tasked by Dennis to oversee and coordinate all of Dennis's companies, including LFUSA. Tr.V. 7, p. 1269, l. 17-p. 1270, l. 23. In early spring 2010, Sherratt traveled to the United States and performed a comprehensive survey of LFUSA's operations in Orofino, including Huber's management. Tr.V. 7, p. 1271, l. 20—p. 1276, l. 10. Sherratt described her survey as a "Workforce Planning Review," in which she interviewed the key managers in LFUSA. *Id.* From her analysis, she determined that: (1) there were communication issues within LFUSA's management structure; (2) there was a lack of formal process for the entire team to get together and communicate as a group; (3) there was a lack of departmental structured meetings among the team; and, (4) there was confusion as to which direction the business was going. Tr.V. 7, p. 1275, l. 11—p. 1276, l. 10; Ex. P-8. In her opinion, there was too much decision-making authority allowed Huber. Tr.V. 7, p. 1369, ll. 17-25. She believed Huber had too much of LUFSA's "triable knowledge" [Tr.V. 7, p. 1278, l. 22—p. 1280, l. 4]; and LFUSA had too much invested in Huber [*Id.*, p. 1370, ll. 1-5]. Sherratt believed Huber's strengths were in research and development, and his weaknesses were in communications and financial accounting. Tr.V. 7, p. 1371, l. 17—p. 1372, l. 4.

In or about July 2010, Sherratt received reports from LFUSA's Finance Manager, Hope Coleman ("Coleman")[5/], in which Coleman disclosed her belief that Huber was misreporting

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4/ LFUSA did not have its own board—the company was governed by a Board of Advisors located in Australia. Tr.V. 7, p. 1269, l.19—p. 1270, l. 17.

5/ Coleman had been hired by Huber to be in charge of LFUSA finances and accounting; and had a master's degree in accounting and was a licensed CPA Tr.V. 2, p. 274, l. 23—p. 276, l. 5.

the amount of LFUSA's backorders in reports to the Board. Tr.V. 7, p. 1288, l. 24—p. 1290, l. 1. Without discussing the issue with Huber, Sherratt investigated the matter and concluded that LFUSA's backorders had been reported to the Board as $1.4 Million but were, in fact, $2.4 Million. Tr.V. 7, p. 1372, l. 5—p. 1374, l. 7. Sherratt learned of this reporting error in July 2010. Dennis was also aware of the reporting error. Tr.V. 6, p. 1154, l. 18—p. 1156, l. 24. Thereafter, Sherratt began formulating a plan to restructure the management of LFUSA, including removing Huber as Vice President of LFUSA. Tr.V. 7, pp. 1376—1377, l. 21.

To that end, Huber was requested to personally attend a Board meeting in Australia, at which meeting Sherratt and Dennis planned to question Huber, without giving Huber any advance notice, about the backorder issue and other management issues. *Id.*; Tr.V. 6, p. 1184, ll. 2-19. On August 31, 2010 (3 days before the Board meeting), Sherratt sent an email to other members of the Board and Dennis outlining her strategy to question Huber about the backorder issues, to ultimately use his responses as a reason to restructure his role in LFUSA, to remove him as Vice President, and to have him focus on research and development. Ex. D-84. Sherratt wrote:

> Leonie has shared with you some of the concerns we have regarding the accuracy and transparency of the NFO Board information submitted. To give you more of an idea and to try and work through a strategy where we can collectively ask questions to Jeff H and depending upon the responses, ultimately provide us with a justifiable reason to restructure his role as it is becoming increasingly clear that he cannot be on top of everything, particularly the financial reporting function. . . .
>
> . . . .
>
> As David and I discussed on Saturday and I think we are all on the same page, we do not want to back Jeff into a corner where he feels he has been "caught out" instructing his staff to mislead the Board—the best outcome would be that he be focused in an R&D position and we have a General Manager or Business Manager or similar to coordinate the entire NFO business . . . .

Id., NFO0642, 644.

The Board meeting was held on September 3, 2010 and, thereafter, an email was sent on September 13, 2010 by Sherratt to the Board, Dennis, managers at LFUSA and others. Ex. P-16, NFO0649-50. The email was approved by Dennis in advance. Tr.V. 6, p. 1186, l. 4—p. 1187, l. 8. The email provides:

> As you know, Jeff has been shooting in the wilderness of Australia, assisting with the filming of a Hunting Series with the Predator Pursuit team, and whilst over here, also had time to meet with the LFA/NFO Board in person rather through the phone line. <u>The Board used this opportunity to congratulate Jeff for his input and leadership to NFO, which had allowed it to experience substantial growth and success with him as the key driver of the business over the last 19 years</u>.
>
> <u>NFO has grown from 4 employees to 61 employees in the last 10 years, which in combination with a substantial growth phase in LFA has raised higher level of complexities than previously experienced. This has led Ray to develop a Board type structure for all of the RL Dennis owned businesses to report through to a Board of Advisors</u>.
>
> This visit provided Jeff and the Board with an opportunity to discuss the continued growth, challenges and future plans for NFO. In this discussion Jeff indicated that he believes that his skills and experience in ensuring continual growth to the business would be best utilised in a specialised R&D role, whereby he would be directly involved in New product development with emphasis in networking with the Military on special projects. The Board agreed that as the business demands regarding reporting, governance the administration requirements continue to grow, it will be difficult for these tasks to be undertaken whilst maintaining an indepth focus on the R&D and associated functions.
>
> . . . .
>
> We have every confidence that Jeff's request to realign his position into a focused R&D, Strategic and Military network type role will provide NFO with a much stronger focus on the key driver of any business, . . .

Ex. P-16, NFO0649-50 (emphasis added). Dennis agreed and believed the business had outgrown Huber because of his lack of education. Tr.V. 6, p. 1185, l. 12—p. 1188, l. 15.

Once Huber returned to the United States, his role changed from that of Vice President to Manager of Research and Development, Quality Assurance and Military Sales ("R&D Director"), as part of the newly created Operations Management Group ("OMG").[6] Tr.V. 6, p. 1185, l. 2—p. 1186, l. 10; Tr.V. 7, p. 1377, l. 22—p. 1378, l. 20; Exs. P-20, NFO0658-59; P-21, NFO0937-38.

Importantly, despite LFUSA's complaints regarding Huber's misreporting of backorders, and even the District Court's finding that Huber's deceit amounted to willful misconduct, a serious breach of company policy and procedure, and was fraudulent [R. 1415], LFUSA did not terminate Huber's employment at that time. Tr.V. 7, p. 1391, ll. 13-15. To the contrary, LFUSA restructured the management of the company to remove from Huber from the role as Vice President to that of R&D Director within the OMG. Tr.V. 6, p. 1185, l. 22—p. 1187, l. 8; Tr.V. 7, p. 1377, l. 22—p. 1378, l. 20. LFUSA wanted Huber to focus on research and development (which everyone believed was his strong suit), and took away from him the financial reporting responsibilities and administrative responsibilities (which were not his strong suit). *Id.*

On February 7, 2011, Huber was requested to sign, and did sign the Employment Contract. Ex. P-22.

On June 29, 2011, Huber assigned eight patents to LFUSA. Ex. P-29.

Huber returned to the United States and began working in the OMG as the R&D Director. LFUSA hired an outside general manager, William Borkett ("Borkett"), to oversee the management of LFUSA. Tr.V. 7, p. 1378, l. 21—p. 1379, l. 18. Ultimately, in May 2011 a decision was made to again restructure Huber's role in LFUSA so he would no longer be a member of the OMG, but instead would work independently as the director of innovations. Tr.V. 6, p. 1193, ll. 7-15; Tr.V. 7, p. 1382, l. 16—p. 1385, l. 13; Ex. P-23, NFO0680.

6/ The other managers included Huber's former subordinates, who had been hired by Huber: Coleman, Kyle Brown, Scott Patterson, Jesse Daniels and Mark Cochran. Tr.V. 2, p. 339, l. 4—p. 341, l. 4; p. 699, ll. 11-23.

On May 25, 2011, after Sherratt, Dennis and Huber had a meeting at LFUSA's facilities in Orofino, an email was sent to the LFUSA managers setting forth Huber's new role in LFUSA. Ex. P-23. The email states:

> Recap below:
>
> - R&D Director (Jeff) to manage the Innovations Group, consisting of Corey, Klaus and Kevin – primary objectives will be new product innovation development . . .
>
> We have decided that the R&D Director position will no longer be part of the OMG . . .
>
> . . . .
>
> As we all appreciate, there have been many changes in NFO over the last 12 months and the most significant changes have been in Jeff's position. Since the initial restructure, Jeff has not had any extended leave and as such, we have encouraged him to take 2 months off work. He has agreed that he would benefit from a complete break, which will allow him time to spend with family, gain clarity on his new position and probably think of some good innovation ideas whilst he is relaxing! . . .

Ex. P-23, NFO0680-81.

Dennis testified:

> **Q:** And you created this role of putting him in innovations in May 31, 2011, because you believed Mr. Huber's strengths were in R & D, correct?
>
> **A:** I believe he had strengths in R & D, yes.
>
> **Q:** And you believed he was an asset to the company if he was able to be focused specifically on R & D, didn't you?
>
> **A:** Innovation and R & D, I was under the belief that he would have a role to play.

Tr.V. 6, p. 1193, ll. 7-15.

In May 2011, no decision had been made to terminate Huber's employment. Tr.V. 7, p. 1384, ll. 16-25. Huber was performing in the R&D department. Tr.V. 7, p. 1385, ll. 1-14; R. 1416.

Huber took the 2-month vacation as requested. While on vacation, the remaining members of the LFUSA OMG held a meeting and informed Dennis, Borkett and Sherratt that if Huber was allowed to return to LFUSA in any capacity, they may begin looking for other employment. Tr.V. 6, p. 1166, l. 18—p. 1167, l. 17; Tr.V. 7, p. 1385, l. 21—p. 1387, l. 12. Based on these threats, Dennis made the decision to again change Huber's employment with LFUSA. *Id.*

On August 1, 2011, as Huber was scheduled to return to LFUSA (August 1, 2011), Dennis, Sherratt and Borkett delivered to Huber a letter explaining to him that rather than have him return to LFUSA's corporate office, he would spend the next 12 months (August 1, 2011 to August 1, 2012) investigating business opportunities outside of LFUSA which Huber and Dennis could pursue together. Tr.V. 2, p. 375, l. 20—p. 378, l. 21; Ex. P-30, NFO0684-85. Huber was informed that during the 12 month period he would continue to be paid his base salary by LFUSA, and if new business opportunities could not be found, his employment with LFUSA would terminate effective August 1, 2012. Ex. P-30.

After being handed the July 31, 2011 letter informing Huber of the final change to his role in LFUSA, he requested an explanation why the new changes were being made. Tr.V. 4, p. 627, ll. 10-16. On August 3, 2011, a letter was delivered to Huber setting forth the reasons why Huber was being directed to work outside of LFUSA's corporate office from August 1, 2011 to August 1, 2012 and, ultimately, detailing why his employment with LFUSA would be terminated on August 1, 2012—one year in the future. Ex. P-31. Dennis testified that the August 3, 2011 letter outlines the reasons why Huber's employment was going to be terminated one year in the future, on August 1, 2012, if a new business could not be found. Tr.V. 6, p. 1196, l. 15—p. 1197, l. 21.

With regard to the August 1, 2011 through August 1, 2012 time period, Dennis testified that Huber did everything he was asked. Tr.V. 6, p. 1194, ll. 2-9.

After Huber's employment was terminated, Dennis refused to pay Huber the 30% goodwill that had accumulated under the CSO, which, by August 1, 2012, was valued at approximately $3.5 Million. R. 1983. Further, LFUSA refused to pay Huber the agreed upon compensation in the Employment Contract. LFUSA claimed that Huber's employment with LFUSA had been terminated for unsatisfactory performance and, therefore, he had forfeited all amounts owed to him by LFUSA under the CSO and the Employment Contract. Nonetheless, Dennis insisted that Huber was bound by the non-competition provisions in the Employment Contract until August 1, 2013. Tr.V. 6, p. 1191, l. 17—p. 1192, l. 2.

II.
ISSUES PRESENTED ON APPEAL

1. Did the District Court err by ruling that the amount owed Huber under the Employment Contract was not "wages" under the Wages Act and not trebling the $180,000.00 as required by Idaho Code § 45-615.

2. Did the District Court err by not properly awarding Huber prejudgment interest on the amounts found due and owing under the Employment Contract?

3. Did the District Court err by ruling that the CSO was a "top hat plan" under 29 U.S.C. § 1051(2) and not subject to the ERISA vesting/anti-forfeiture provision (29 U.S.C. §§ 1001-1061), ERISA's funding provision (29 U.S.C. §§ 1081-1086), and ERISA's fiduciary responsibility provision (29 U.S.C. §§ 1101-1114)?

4. If the District Court correctly characterized the CSO as a "top hat plan," did the District Court err by ruling that the benefits under the CSO could be forfeited?

5. If the District Court correctly characterized the CSO as a "top hat plan," did the District Court err by ruling that all of Huber's earned benefits under the CSO were forfeited?

6. Did the District Court err by not considering Huber's claim for equity and denying Huber's motion to amend filed under I.R.C.P. 15(b)?

7. Did the District Court err by dismissing Huber's wrongful termination claim on summary judgment?

8. Did the District Court err by ruling that LFUSA was the prevailing party in the litigation under I.R.C.P. 54(d)(1)(B) and awarding LFUSA attorneys' fees under Idaho Code § 12-120(3) and costs under I.R.C.P. 54(d)(1)(C)?

9. Did the District Court err by ruling that Huber was not the prevailing party under I.R.C.P. 54(d)(1)(B) with regard to the Idaho State law claims and by not awarding Huber attorneys' fees under Idaho Code § 12-120(3) and costs under I.R.C.P. 54(d)(1)(C)?

10. This Court should award Huber attorneys' fees and costs on appeal under Idaho Code §§ 12-120(3), 45-615 and 29-056, and 29 U.S.C. 1132(g)(1).

III. ARGUMENT

A. The District Court Erred By Ruling That The Amount Due And Owing Huber Under The Employment Contract Was Not "Wages" Under Idaho Code §§ 45-601, *et seq.*, And By Not Trebling The $180,000.00 Judgment As Required By Idaho Code § 45-615.

1. Proceedings.

On July 1, 2013, Huber moved the District Court for partial summary judgment, asking the District Court to find that any compensation due and payable to Huber by LFUSA under the Employment Contract was wages under Idaho Code §§ 45-601, *et seq.*, and should be trebled pursuant to Idaho Code § 45-615. R. 221-353. On August 28, 2013, the District Court entered an order finding that any compensation owed Huber under the Employment Contract could not be classified as "wages." R. 677. The District Court stated:

> The amount of consideration the plaintiff expected to receive under the NDA [Employment Contract] for the period of time between August 1, 2012 and August 1, 2013 was basically to compensate him for not competing with the defendant and not disclosing any business or product secrets of the defendant. As such, the anticipated compensation was not earned in increments as services were performed nor paid as direct consideration for services rendered.
>
> The court concludes that any consideration the plaintiff was to receive under the NDA [Employment Contract] was not "'wages" pursuant to the Idaho Wage Claim Act.

R. 677.

Ultimately, after trial, the District Court concluded that LFUSA had breached the Employment Contract by not paying Huber $180,000.00 (his base salary at the time of his termination) and that Huber was entitled to a judgment in the amount of $180,000.00. R. 1417.

Huber asserts that the $180,000.00 awarded him based upon LFUSA's breach of the Employment Contract was "wages" under Idaho Code §§ 45-601, *et seq.*, and should be trebled pursuant to Idaho Code § 45-615.

2. <u>Standard of Review</u>.

The District Court appears to have made the determination that the Employment Contract was clear and unambiguous and reached the legal conclusion that any compensation owed Huber under the Employment Contract was not "wages." The District Court's decision is subject to *de novo* review by this Court. *City of Meridian v. Petra, Inc.*, 154 Idaho 425 (2013); *Potlatch Education Association v. Potlatch School District No. 285*, 148 Idaho 630, 632 (2010) (interpretation of an unambiguous contract is a question of law subject to *de novo* review).

3. **Argument.**

The Employment Contract at issue was entered into between LFUSA and Huber on February 7, 2011, and provides: "This deed constitutes a term of the employment contract between the Employee and the Company." Ex. P-22, ¶ 14.1, NFO0344. "This deed is the whole contract between the parties about its subject matter." *Id.*, ¶ 2, *Entire Agreement*, ¶ 2.1, NFO0345. "This deed supersedes any prior contract or obligation between the parties about its subject matter." *Id.*, ¶ 2.3. The Employment Contract further provides:

> In the event that the employee is terminated for any reason other than performance related issues (as defined) and/or summary dismissal (as defined), the employer will pay the employee an amount congruent with the base salary at the time of termination for the period as stipulated in 3.1 in accordance with the provisions outlined in 3.2.1 and 3.2.2.

Id., ¶ 3.2, NFO0341. In substance, Paragraph 3.1 of the Employment Contract specifies a 12-month period of time; Paragraph 3.2.1 provides that if at any time within the 12 months from the date of termination the employee is employed by another employer from which the employee derives compensation equal to or in excess of the base salary at the time of termination, the payments described in Paragraph 3.2 will cease; and, Paragraph 3.2.2 provides that if any compensation derived from the new employer is less than the amount of the base salary at the time of termination, the employer will pay the difference between the compensation received by the employee from the new employer and the base salary for the remainder of the 12-month period. *Id.*, ¶¶ 3.1, 3.2.1, 3.2.2. Paragraph 3.2 concludes with the definitions of "performance issues" and "summary dismissal." *Id.*, ¶¶ 3.2.3-3.2.4, NFO0341-42.

On this issue, the District Court in its 12.10.13 Findings/Conclusions after trial stated:

> The court further concludes that a reasonable person would not find Huber's work performance during the time period covered by the NDA [February 7, 2011 through August 1, 2013] was substandard. The court further concludes that Huber was not summarily dismissed.
>
> . . .
>
> Therefore, the court concludes that Huber is entitled to damages for breach of contract in the amount of $180,000.00 pursuant to the NDA. . . .

R. 1416-1417. LFUSA's breach of the Employment Contract and Huber's entitlement to $180,000.00 is not on appeal and is not disputed by LFUSA. The District Court's decision, however, that the $180,000.00 owed Huber was not "wages" was an error and should be reversed by this Court.

This Court has ruled that severance payments are wages under Idaho Code §§ 45-601, *et seq*. *Parker v. Underwriters Laboratories, Inc.*, 140 Idaho 517, 521 (2004); *Johnson v. Allied Stores Corp.*, 106 Idaho 363, 367 (1984). In *Johnson*, this Court held that severance pay is covered by the Wages Act and stated: "A claim for severance pay is also a component of the compensation in an employment agreement. Severance pay is not a mere gratuity." *Id.* at 367. The Ninth Circuit Court of Appeals, applying Idaho law, clarified " . . . [a] severance payment is a 'wage' if it is 'part of the compensation bargained for in the agreement of employment' and 'not a mere gratuity.'" *Gomez v. MasTec North American, Inc.*, 284 Fed.Appx. 517, 519 (9^{th} Cir. 2008) (unpublished decision).

The payment owed by LFUSA to Huber upon termination of his employment was equal to one year's salary at the time of the termination. The compensation was bargained-for as part of the employment relationship and was a wage under Idaho Code §§ 45-601, *et seq*. The Employment Contract states that the Employment Contract is part of the employment agreement between Huber and LFUSA. Ex. P-22, ¶ 14.1, NFO0344. The compensation was earned as part of

Huber's employment and was payable as a severance benefit on termination. There is nothing within the four corners of the Employment Contract that conditions payment of the severance benefit (*i.e.,* the equivalent of one year's salary) upon Huber not competing and/or not disclosing trade secrets as found by the District Court. To the contrary, the only condition to payment was that Huber's employment not be terminated for substandard performance or summary dismissal. While the section dealing with the severance payment is contained within the same section addressing non-competition, there is nothing tying the provisions together or making payment contingent upon Huber not competing.

The District Court found that Huber's employment was not terminated for performance issues or because of a summary dismissal; thus, the severance payment was due and payable to Huber as a wage. The District Court erred in determining that the payment owed under the Employment Contract was not a wage. The District Court's decision should be reversed with direction to treble the amount of the judgment (*i.e.,* $180,000.00) in accordance with Idaho Code § 45-615.[7/]

B. <u>The District Court Erred By Not Properly Awarding Huber Prejudgment Interest On The Amounts Found Due And Owing Under The Employment Contract</u>.

1. <u>Proceedings</u>.

After judgment was entered in favor of Huber in the amount of $180,000.00 based upon LFUSA's breach of the Employment Contract, Huber moved the District Court to amend the judgment to include prejudgment interest. R. 1481-1486. Huber argued that the amount due under the Employment Contract was certain and payable at the termination of his employment and that

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7/ At a minimum, if the Employment Contract is deemed ambiguous, the District Court should have resolved the issue after taking testimony from the parties at trial, not on summary judgment interest at the rate of 12% *per annum* pursuant to Idaho Code § 28-22-104 should be added to the judgment from the date of termination of his employment—August 1, 2012 (*i.e.*, the date payment was due and payable). Huber argued that, at the very least, if payments were to be made to Huber every two weeks, then prejudgment interest should be calculated as each payment came due and went unpaid.

The District Court granted Huber's motion, but only awarded prejudgment interest from August 1, 2013 through December 10, 2013. Essentially the District Court ruled that no payments were due under the Employment Contract until August 1, 2013—one year after Huber's employment was terminated on August 1, 2012. The District Court reasoned:

> Even though Huber should have received bi-monthly checks during the 12 months after his employment was terminated, his right to receive the $180,000.00 was also dependent upon him complying with the anti-competition clause of the NDA for the entire 12 month period. Thus, if Huber had breached the ant-competition clause of the NDA during the last month of the 12 month period following his termination, under the NDA he would not have been entitled to any of the $180,000.00. . . .

R. 1982.

2. <u>Standard of Review</u>.

The District Court appears to have made the determination that the Employment Contract was clear and unambiguous and reached the legal conclusion that any compensation owed Huber under the Employment Contract was not "wages." The District Court's decision is subject to *de novo* review by this Court. *City of Meridian v. Petra, Inc.*, 154 Idaho 425 (2013); *Potlatch Education Association v. Potlatch School District No. 285*, 148 Idaho 630, 632 (2010) (interpretation of an unambiguous contract is a question of law subject to *de novo* review).

3. **Argument.**

The District Court's interpretation of the Employment Contract that payment of the $180,000.00 was dependent upon Huber complying with anti-competition clause of the Employment Contract was erroneous. The Employment Contract placed responsibilities on both parties. Huber was called-on to not disclose trade secrets, to assign patents to LFUSA, to not compete for 12 months after his employment ended, and imposed other miscellaneous obligations on Huber. Ex. P-22. On the other hand, LFUSA was required, upon the termination of Huber's employment, to pay him $180,000.00 (*i.e.*, an amount congruent with his base salary at the time of termination). There were only two conditions imposed upon the payment of the $180,000.00 to Huber: That Huber's employment was not terminated for substandard/unsatisfactory performance or summary dismissal (as defined in the Employment Contract). Nowhere in the Employment Contract is payment of the $180,000.00 conditioned upon Huber not competing, not disclosing trade secrets or turning-over intellectual property rights. If Huber had breached any of those obligations, LFUSA's remedy was *not* to have Huber forfeit the $180,000.00 due under the Employment Contract, as reasoned by the District Court. LFUSA's remedy was to seek and prove actual damages or, as the Employment Contract specifies, seek an injunction. Ex. P-22, ¶ 17, NFO0344.

The $180,000.00 severance pay was due and owing on the day Huber's employment was terminated. Prejudgment interest should have been awarded from the day LFUSA breached the Employment Contract—August 1, 2012—until the entry of judgment—December 13, 2013. Even if LFUSA owed Huber 26 equal payments, paid every two weeks from the date his employment was terminated, the first payment was due August 15, 2012. LFUSA failed to make that payment, thereby breaching the Employment Contract and rendering the entire amount due.

Thus, prejudgment interest should have been calculated from no later than August 15, 2012. At a bare minimum, interest should have been calculated as each payment came due and went unpaid, not at the end of the non-competition term as reasoned by the District Court. The District Court's decision was erroneous and should be reversed.

C. <u>The District Court Erred By Ruling That The CSO Was A "Top Hat Plan" Under 29 U.S.C. § 1051(2) And Not Subject To ERISA's Vesting/Anti-Forfeiture Provision (29 U.S.C. §§ 1001-1061), Funding Provision (29 U.S.C. §§ 1081-1086), And Fiduciary Responsibility Provision (29 U.S.C. §§ 1101-1114)</u>.

1. <u>Proceedings</u>.

LFUSA filed a motion for partial summary judgment asserting that the CSO was a "top hat plan" under ERISA and any benefits owed Huber could be forfeited pursuant to the terms of the CSO. The District Court granted LFUSA's motion and again ruled on the issue after trial.

The District Court ruled that the CSO was unfunded and, therefore, a "top hat plan" under ERISA. As a "top hat plan," the benefits owed Huber could be forfeited if LFUSA proved Huber's employment was terminated for unsatisfactory performance.

2. <u>Standard of Review</u>.

The District Court's decision that the CSO was unfunded is a question of law subject to *de novo* review by this Court. *Firestone Tire and Rubber Company v. Bruch*, 489 U.S. 101, 114, 109 S.Ct. 948, 956-57 (1989); *Reliable Home Health Care, Inc. v. Union Cent. Ins. Co.*, 295 F.3d 505, 510 (5th Cir. 2002); *Duggan v. Hobbs*, 99 F.3d 301, 307 (9th Cir. 1996).

3. <u>Argument</u>.

(a) <u>The CSO Was a Deferred Compensation Plan and the Benefits Owed Huber Could Not Be Forfeited</u>.

"A deferred compensation plan 'is an agreement by the employer to pay compensation to employees at a future date." *In re IT Group, Inc.*, 448 F.3d 661, 664

(3d. Cir. 2006). Congress enacted ERISA to establish administrative and enforcement procedures for deferred compensation plans which, among other things, prohibit forfeiture and impose fiduciary duties to properly fund the plan. 29 U.S.C. § 1001(a); *John Hancock Mut. Life Ins. Co. v. Harris Trust & Savings Bank*, 510 U.S. 86, 96, n. 5, 114 S.Ct. 517 (1993). The purpose of ERISA was to give broad protection for employees and prevent employers from interfering with an employee's vested right to receive the funds promised in a deferred compensation agreement. *Id.* As such, ERISA preempts all state law if it "relates to" an employee benefit plan. 29 U.S.C. § 1144(a); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47, 107 S.Ct. 1549, 1553 (1987). Under ERISA, an employee's right to receive the funds promised in a deferred compensation agreement is vested and becomes non-forfeitable after 6 years. 29 U.S.C. § 1053(a)(2)(B).

In this case, the District Court ruled, and the parties agree, that the CSO is a deferred compensation plan that is governed by ERISA, 29 U.S.C. §§ 1001, *et seq.* R. 676-77, 679. As such, the benefits owed Huber could not be forfeited unless LFUSA proved the CSO was a "top hat plan." The District Court also ruled that the CSO was unfunded; therefore, a "top hat plan" not subject to ERISA's anti-forfeiture provision and could, in fact, be forfeited pursuant to the CSO's terms. In this case, however, the CSO was maintained by LFUSA to provide Huber compensation upon retirement, disability or death; was funded through a cash value life insurance policy; and, could not be a "top hat plan." In other words, the CSO was subject to ERISA's anti-forfeiture provision and could not be forfeited or claimed by LFUSA as ruled by the District Court.

(b) "Top Hat Plan" Defined.

Certain deferred compensation plans known as "top hat plans" are exempt from certain provisions of ERISA, including the vesting/anti-forfeiture provision, funding provision and fiduciary responsibility provision. 29 U.S.C. §§ 1051(2), 1081(a) (3) and 1101(a)(1).

ERISA defines a "top hat plan" as "[a] plan which is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees." 29 U.S.C. § 1051(2); *see also* 29 U.S.C. §§ 1081(a)(3), 1101(a)(1). A plan is "unfunded," if:

> The employer promises to pay the employee the deferred compensation at a specified time, but does not set aside the fund in an escrow, trust fund, or otherwise. The assets used to pay the deferred compensation are the general assets of the employer and are subject to the claims of the employer's general creditors.

In re IT Group, 448 F.3d at 665.

(c) The CSO Was Funded by Insurance and Therefore Not a "Top Hat Plan" and the Benefits Owed Huber Were Not Forfeited.

As found by the District Court, after the CSO was executed, LFUSA purchased a $1 Million term life insurance policy, under which Huber's parents were 50% beneficiaries. In 2006 after the 6 year vesting period, after Huber had earned the maximum 30% goodwill in LFUSA, $250,000.00 of the term policy was converted into a cash value whole life insurance policy (*i.e.*, the New Policy), which designated Huber as the owner and recipient of *all* benefits from the New Policy. Dennis testified that the purpose of the Policy was to fund the CSO, and the insurance agent who wrote the Policy testified that the original Policy was converted to a guaranteed cash value policy so that the cash value of the New Policy would be available to Huber when he left LFUSA.

Life insurance policies with a guaranteed cash value are known under ERISA as "guaranteed benefit policies" and are acknowledged by the United States Supreme Court as an acceptable means for funding ERISA deferred compensation plans. 29 U.S.C. § 1101(b)(2); *John Hancock Mut. Life. Ins. Co.* 510 U.S. at 90. Under the guidance set out by the Supreme Court, a life insurance policy is considered a "guaranteed benefit policy" and a "plan asset" under ERISA if it is an insurance policy that "provides for benefits the amount of which is guaranteed by the insurer." *John Hancock Mut. Life. Ins. Co.*, 510 U.S. at 106.

Lower courts have clarified the issue. *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208 (8th Cir. 1981); *cf. Belsky v. First Nat. Life. Ins. Co.*, 818 F.2d 661 (1987). When determining whether a life insurance policy is used to fund an ERISA plan, the court must look to the plan's documentation. *In Re IT Group, Inc.*, 448 F.3d 661, 668 (3d. Cir. 2006). The purpose for examining the relationship between the plan documentation and the insurance policy is to distinguish between insurance policies that are offered merely as a fringe benefit of employment and policies that fund the retirement plan, are vested and non forfeitable. *See Howard Delivery Service, Inc. v. Zurich American Ins. Co.*, 547 U.S. 651, 658-660 (2006) (discussing the difference between fringe benefit plans and retirement plans in relation to their priority in bankruptcy proceedings).

To resolve the question, the trial court must ask: "Can the beneficiary establish, through the plan documents, a legal right any greater than that of an unsecured creditor to a specific set of funds from which the employer is, under the terms of the plan, obligated to pay the deferred compensation?" *In re IT Group, Inc.*, 448 F.3d 661, 668 (3rd Cir. 2006). Ultimately two requirements have emerged from this inquiry: (1) whether the plan documents point to a "*res* separate from the ordinary assets of the company" to pay benefits [*Dependahl*, 653 F.2d at 1214; *Demery v. Extebank Deferred Compensation Plan*, 216 F.3d 283, 287 (2d Cir. 2000) (looking at whether the plan was paid solely out of the general assets of the employer)]; and (2) whether the rights of the beneficiaries to the insurance benefits under the plan are greater than those of an unsecured creditor [*Belsky*, 818 F.2d at 663-64; (8th Cir. 1987); *Reliable Home Health Care, Inc.*, 295 F.3d at 514].

In *Dependahl*, the insurance policy purchased by the company was a cash-value life insurance policy that was owned by the employee, by which the named beneficiaries of the participant would receive annuity income benefits upon the participant's death and the employer would recover annual premiums previously paid plus interest. 653 F.2d at 1213-14. The Eighth Circuit held that, "[a]ll whole-life insurance policies which have a cash value with premiums paid in part by corporate contributions to an insurance firm are funded plans." *Id.* at 1214. The court reasoned that the plan was funded because the insurance policy provided a "*res* separate from the corporation" that the employee may look to for liability of the plan. *Id.*

In *Belsky*, the same court clarified that a plan purportedly financed through the purchase of a cash value life insurance policy was unfunded. *Belsky*, 818 F.2d at 663. In *Belsky*, the employee had no ownership interest in the insurance policy and the plan expressly provided that "[t]he rights of the [employee] shall be solely those of an unsecured creditor," and stated that if the employer acquired an insurance policy, such policy was not for the benefit of the plan. *Id.* at 663. The court concluded that the plan was unfunded because the plan expressly denied being tied to the insurance policy; the plan documents failed to point to a "*res* separate"; the rights of the beneficiaries were not greater than those of an unsecured creditor; and, limited the participants' rights to the insurance benefits to that of an unsecured creditor. *Id.*

Under the most restrictive view, a plan will be considered "funded" by insurance if the plan specifies that it will be funded by the purchase of an insurance policy; the plan does not limit the employee's rights to that of an unsecured creditor or limit the employee's rights to only the company's general assets; and the life insurance policy being used to fund the plan is not simply a general asset of the employer. *See In re IT Group, Inc.*, 448 F.3d 661, 668-69 (3rd Cir. 2006) (finding the plan to be unfunded where the plan documentation expressly said the plan was "unfunded" and the participant had no greater rights than an unsecured creditor).

The Third Circuit has said that, in order to determine whether the participant has rights greater than an unsecured creditor and whether the funds are subject to the claims of the corporation's general creditors, the court must look to the surrounding facts and circumstances, including the status of the plan under non-ERISA law. *In re IT Group, Inc.*, 448 F.3d at 668; Department of Labor, <u>Pension & Welfare Benefits Programs</u>, Op. Ltr. 92-13A, 1992 ERISA Lexis 14. In analyzing the rights of the employee under non-ERISA law, ownership of the policy is an important factor in determining the rights of the participant. *Reliable Home Health Care, Inc.*, 295 F.3d at 514 (plan was unfunded where participant was not designated as an owner of the life insurance policy); *cf. Dependahl*, 653 F.2d at 1214 (plan was funded where participant was designated as owner of life insurance policy). This is because, under the United States Bankruptcy Code, the estate of a corporation does not include non-ownership interests in life insurance policies of which the corporation is merely a beneficiary. *See* 11 U.S.C.A. § 541. Therefore, if the insurance policy is owned by the employee, it is not subject to the claims of the employer's general creditors and sufficient to fund an ERISA plan. *See Reliable Home Health Care, Inc.*, 295 F.3d at 514.

In this case, the Amended Policy funded the CSO and removed the CSO from construction as a "top hat plan." As in *Dependahl*, the language used by LFUSA in the CSO states that, for the purposes of death, disability and ill health, the plan will be funded through an insurance policy purchased by the corporation and that Huber will be paid his earned retirement benefits from the insurance policy. The CSO does not provide that LFUSA would receive any of the insurance proceeds or that the proceeds are subject to the claims of LFUSA creditors, or that Huber had no rights greater than an unsecured creditor. Ex. P-1.

The CSO expressly points to an insurance plan to be provided by LFUSA to pay Huber. The CSO points to a *res* separate from the general assets of LFUSA to which Huber could look for payment of the CSO if he should die, become disabled or have ill-health. Additionally, after Huber accumulated the maximum benefits provided for in the CSO, the Policy used to fund the CSO was amended to a cash value whole life policy that designated Huber as the owner and provided a guaranteed cash amount that would be paid out if Huber surrendered the New Policy.

The CSO was "funded" by the whole life cash value policy. Because the CSO was funded, it fails to meet the definition of a "top hat plan." As such, the CSO was subject to the anti-forfeiture provision of ERISA and Huber's benefits were not forfeitable. The District Court's decision on finding that Huber's earned benefits under the CSO were forfeitable should be reversed.

D. Even If The District Court Correctly Characterized the CSO As A "Top Hat Plan," The District Court Nonetheless Erred In Ruling That The CSO's Forfeiture Provision Was Enforceable.

1. Proceedings.

As set forth above, the CSO was a funded ERISA plan, subject to the vesting requirements and anti-forfeiture provision of ERISA. Huber's benefits were fully vested and not forfeitable. To avoid that result, the District Court determined that the CSO was a "top hat plan" and ***not*** subject to ERISA's anti-forfeiture provision; thus, the District Court ruled that the benefits owed Huber under the CSO would be forfeited by Huber if LFUSA proved that Huber's employment was terminated for unsatisfactory performance as set forth in the CSO. The District Court's ruling was in error because the CSO forfeiture provision is not enforceable as a matter of federal law.

2. Standard of Review.

The District Court's decision that the CSO was a "top hat plan" and not subject to ERISA's anti-forfeiture provision is a question of law subject to *de novo* review by this Court. *Firestone Tire and Rubber Company v. Bruch*, 489 U.S. 101, 114, 109 S.Ct. 948, 956-57 (1989); *Reliable Home Health Care, Inc. v. Union Cent. Ins. Co.*, 295 F.3d 505, 510 (5th Cir. 2002); *Duggan v. Hobbs*, 99 F.3d 301, 307 (9th Cir. 1996).

3. Argument.

The CSO provides that Huber would earn a percentage of goodwill in LFUSA from October 2002 to October 2006 at the rate of 5% per year, and that the goodwill would be paid to him when he left the company unless his employment was terminated for unsatisfactory performance. It is undisputed that Huber earned 30% of the "goodwill" in LFUSA by working for LFUSA from October 2002 to October 2006. All of the benefits to which Huber is entitled under the CSO were earned and owned by Huber as of October 2006. The District Court nonetheless concluded that the earned benefits could be forfeited in total if LFUSA proved that on August 1, 2012 (6 years after Huber's benefits had been earned) it terminated Huber's employment for unsatisfactory performance. The District Court's conclusion was in error.

"The forfeitability of benefits under top hat plans, like all ERISA plans, is governed by federal common law." *Tyco International Ltd. v. Kozlowski*, 756 F.Supp.2d 553, 565 (SDNY 2010). While certain forfeitability provisions in top hat plans have been upheld and enforced, the forfeiture provision must comply with federal law. A review of the federal cases addressing the forfeitability of benefits under a top hat plan indicates that forfeiture provisions have only been enforced in two specific situations: When the former employee breaches a non-competition clause or the employee has been involved in criminal activity while employed. *Tyco International Ltd.*, 756 F.Supp.2d 553; *CEG United States v. Graham*, 2007 Westlaw 1806174 (Eastern Dist. Mich. 2007); *Evertt v. Nefco Corp.*, 2007 Westlaw 2936210 (Dist. Conn. 2007).

The court's analysis in *Hollingsbeck v. Falstaff Brewing Corporation*, 605 F.Supp 421 (Eastern Dist. MO 1985), is instructive. In *Hollingsbeck*, Ferdinand Gutting ("Gutting") was an executive who was covered by Falstaff Brewing Corporation's ("FBC") "CVS Plan," which was subject to ERISA. *Id.*, 605 F.Supp. at 426. Pursuant to the CVS Plan, an executive's beneficiaries would receive the proceeds of the life insurance policy purchased by FBC for the executive. *Id.*, at 425-26. The CVS Plan contained the following provision:

> All payee's benefits payable under the terms of this Agreement shall be forfeited if . . . he . . . is discharged for proper cause.
>
> As used in this Agreement, the term "proper cause" shall include but not be limited to (1) failure to perform assigned duties with reasonable skill and diligence, (2) gross misconduct, or (3) conviction of a felony.

Id., at 426. After a takeover of the controlling interest in FBC, Gutting left FBC. *Id.* Upon Gutting's death, his widow sought benefits under the CVS Plan but FBC failed to pay the requisite benefits. *Id.* FBC argued that Gutting had no right to benefits because Gutting had been fired for "proper cause." *Id.*

In holding that the forfeiture clause was not enforceable, the *Hollingsbeck* court noted that "federal courts have subjected bad boy clauses to a rigorous reasonableness test as a matter of federal common law whenever the substantive non-forfeiture provisions of ERISA are not applicable." *Id.*, at 428 (citations omitted). The court stated:

> Even if a difference in managerial styles is construed to be "proper cause" for termination under . . . the CVS Plan, <u>this type of "proper cause" is too speculative to sanction the forfeiture of ERISA benefits</u>. . . . [T]he federal common law of ERISA requires some objective criteria by which the court can judge whether defendant's invocation of a forfeiture clause is reasonable. . . . In order to prevent abuse of bad boy clauses, employers must prove that plaintiff was actually fired because of some impropriety that would breach the business sensibilities of a hypothetical "reasonable" businessman. Obvious examples are cases in which plaintiff is fired because he committed some crime or gross misconduct that harmed his employer (citations omitted). <u>But simple disagreements over business judgments, or even acts of incompetence, would generally be insufficient to meet the rigorous standard of reasonableness under federal common law</u>.

Id., at 434, 435 (emphasis added). The court noted that:

> It was not objectively reasonable to forfeit Gutting's beneficiaries' death benefits based on the actual reasons that led defendant to fire Gutting. Even though Gutting may have been responsible for some gross misconduct, Gutting was actually fired over a difference in management style, or, at most, a failure to perform his assigned duties in the way [FBC] desired that they be performed. <u>The actual reasons</u> for Gutting's discharge are insufficient as a matter of federal common law to merit the forfeiture of his beneficiaries' death benefits.

Id., at 435 (emphasis added).

In this case, while the CSO does state that Huber's goodwill would be lost in the event of termination due to "unsatisfactory performance," it fails to provide objective criteria to determine what "unsatisfactory performance" could result in a forfeiture. As a matter of federal common law, the forfeitability provision of the CSO is too broad to be enforceable.

Even if Huber's ERISA benefits could be forfeited, the District Court applied the wrong standard. As is set forth in *Hollingsbeck*, the actual reason for the termination must be " . . . some impropriety that would breach the business sensibilities of a hypothetical 'reasonable' businessman." *Id.*, at 435. Such conduct would be gross misconduct that harmed the employer or a crime; not incompetence or disagreements over management style. In this case, the District Court concluded that "[a] reasonable person would find that Huber's actions as vice-president (failing to address production issues), management style, demeanor, and unprofessional treatment of LFUSA employees collectively amount to unsatisfactory performance." R. 1419. The District Court held Huber to a "reasonable person standard," citing that a reasonable person would believe that Huber's employment was terminated for unsatisfactory performance. As is set forth in *Hollingsbeck*, Huber should have been held to the standard of a "reasonable businessman."

The District Court incorrectly applied the CSO to Huber's role as Vice President. Nowhere in the CSO is payment contingent upon satisfactory performance as Vice President. The CSO simply addresses whether his employment, whatever it was at the time. Here, the District Court found that Huber had performed satisfactorily in the R&D department [R. 1415] and that he performed satisfactorily for the last 18 months of his employment with LFUSA. The actions which the District Court found amounted to "unsatisfactory performance" (*i.e.,* Huber's failure to address production issues [incompetence], management style, demeanor [management style] and unprofessional treatment of LFUSA employees [management style]) do not constitute gross misconduct or the commission of a crime, and are insufficient reasons to forfeit ERISA benefits. The *Hollingsbeck* court specifically sets forth that incompetence and disagreements over management style cannot form the basis of a forfeiture.

While the District Court did find that Huber ordered his finance manager and sales manager to prepare false reports hiding the fact that LFUSA had significant problems producing sufficient products to fulfill customer orders; that Dennis was most upset by Huber's false reports to the Board for the fiscal year ending June 30, 2010; and, that Huber failed to "come clean" when given the opportunity [R. 1415], none of these complaints actually resulted in the termination of Huber's employment. In fact, the opposite is true. Each one of the alleged "bad acts" found by the District Court took place in June, July or August 2010. Dennis, Sherratt and LFUSA became aware of these complaints before the September 3, 2010 Board meeting and questioned Huber about the alleged false reporting of backorder numbers. None of that activity, however, resulted in the termination of Huber's employment. Huber continued to work for LFUSA for another two years, until August 1, 2012. What LFUSA did do was remove Huber as Vice President and made him the R&D Director and then the Innovations Director. He held those positions until August 1, 2011, and he spent the last year of his employment with LFUSA looking for new business opportunities which Huber and Dennis could operate outside of LFUSA. Dennis testified that Huber did everything he was supposed to do during the last year of Huber's employment.

The District Court's finding that Huber committed some gross misconduct, and flawed and serious breach of company policies did not result in Huber's employment being terminated.

E. Even If The District Court Correctly Concluded That The CSO Was A Top Hat Plan And Huber's Benefits Under The CSO Could Be Forfeited Because His Employment Was Terminated For Unsatisfactory Performance, There Was Still Insufficient Evidence To Find That Huber's Benefits Should Be Forfeited In Total.

1. Standard of Review.

The District Court's decision that the CSO was a "top hat plan" and not subject to ERISA's anti-forfeiture provision is a question of law subject to *de novo* review by this Court. *Firestone Tire and Rubber Company v. Bruch*, 489 U.S. 101, 114, 109 S.Ct. 948, 956-57 (1989); *Reliable Home Health Care, Inc. v. Union Cent. Ins. Co.*, 295 F.3d 505, 510 (5th Cir. 2002); *Duggan v. Hobbs*, 99 F.3d 301, 307 (9th Cir. 1996).

2. Argument.

The United States Supreme Court has long recognized that forfeitures are not favored in either law or equity. *Farmers & Merchants National Bank v. Dearing*, 91 U.S. 29, 35, 22 L. Ed. 196 (1875) ("Forfeitures are not favored in the law. Courts always conclude against them."); *Hartford Life & Annuity Insurance Company v. Unsell*, 144 U.S. 439, 12 S.Ct. 671 (1892) (that forfeitures are not favored in the law; and that courts are always prompted to seize hold of any circumstance that indicates an election to waive forfeiture); *U.S. v. 1936 Model Ford V8 Deluxe Coach, Motor No. 18-3306511*, 307 U.S. 219, 226, 59 S.Ct. 861, 865 (1939) (forfeitures are not favored; they should be enforced only within both the letter and the spirit of the law). Forfeiture provisions are to be strictly construed. *Columbia RY Gas & Electric Company v. South Carolina*, 261 U.S. 236, 43 S.Ct. 306 (1923). "Without a clear known forfeiture provision, under federal common law, an employer is entitled to withhold top hat plan benefits accrued during the period of beneficiary's disloyalty." *Aramony v. United Way Replacement Benefit Plan*, 28 F.Supp.2d 147, 172 (S.D.N.Y. 1998) (emphasis added); reversed in part on other grounds. *Aramony*, 191 F.3d 140 (2nd Cir. 1999).

In the case of *Tyco*, 756 F.Supp.2d at 553, 564, the court dealt with a situation where the former CEO of Tyco claimed entitlement to benefits under a top hat ERISA plan. The court held that because the top hat plan in question did not have an anti-forfeiture provision, benefits accrued during a period of an employee's disloyalty could be withheld; however, benefits that accrued before the period of disloyalty could not be forfeited. In *Tyco*, the court was dealing with a situation where the CEO had been convicted of embezzlement from the company. The court held:

> Because neither DCP nor the SERP contained non-forfeiture clauses, Kozlowski must forfeit benefits accrued during the period of his disloyalty. Thus, Tyco is entitled to a partial summary judgment dismissing Kozlowski's third and fourth counterclaims as to all benefits accrued after the beginning of his misconduct. **This misconduct conclusively began at its latest in September 1995, but there is still an open question as to possible benefits accruing earlier. Tyco may, of course, make the case at trial that Kozlowski's misconduct began prior to his enrollment in the plans.**

Id., at 564 (emphasis added).

In this instance, LFUSA argued and the District Court agreed that all of Huber's accrued benefits under the CSO could be forfeited pursuant to the terms of the CSO because his employment was terminated in August 2012 for unsatisfactory performance. This included all benefits accrued since October 2000 without any evidence of misconduct during the time period. There was no evidence presented to the District Court of any gross misconduct, criminal acts, criminal wrongdoing or even unsatisfactory performance prior to summer 2010 or after

February 7, 2011 (the date the Employment Contract was signed under which the District Court determined Huber was not terminated for unsatisfactory performance). Even with the complete lack of evidence of any wrongdoing by Huber before summer 2010, the District Court erroneously determined that all of Huber's benefits were forfeited. The District Court's determination was contrary to federal law and should be reversed.

F. The District Court Erred In Not Considering Huber's Claim For Equity And Denying Huber's Motion To Amend Filed Under I.R.C.P. 15(b).

1. Proceedings.

The District Court refused to hear or consider Huber's claim that, as a matter of equity, none of the benefits earned under the CSO should be forfeited. The District Court claimed that Huber had not pled equity. The District Court refused to allow Huber to amend under I.R.C.P. 15(b).

2. Standard of Review.

The District Court's decision to not allow Huber to amend and its decision not to consider Huber's equitable claim is reviewed for an abuse of discretion.

3. Argument.

Here, Huber did plead equity in his complaint [R. 26, 203-205] and during closing argument [Tr.V. 7, p. 1510, l. 20—p. 1512, l. 9]. The District Court's decision should be reversed.

G. The District Court Erred By Finding That LFUSA Was The Prevailing Party Under I.R.C.P. 54(d)(1)(B) And By Awarding LFUSA Attorneys' Fees Under Idaho Code § 12-120 And Costs Under I.R.C.P. 54(d)(1)(C).

1. Proceedings.

Following trial, the District Court awarded Huber a judgment against LFUSA in the amount of $180,000.00 and prejudgment interest from August 1, 2013 until entry of judgment on

December 13, 2013. Through post-trial motions, both parties claimed they were: (1) the prevailing party under I.R.C.P. 54(d)(1)(B); (2) entitled to costs under I.R.C.P. 54(d)(1)(C); and (3) entitled to an award of attorneys' fees under Idaho Code § 12-120(3). Both parties also claimed a right to attorneys' fees and costs under ERISA, 29 U.S.C. § 1132(g)(1).

In its Post Trial Findings [R. 1982-1986], the District Court ruled that, with regard to Huber's ERISA claim and LFUSA's defense of that claim, neither party was entitled to an award of attorneys' fees or costs. The District Court stated:

> No attorney fees or costs should be awarded either party under ERISA. To award attorney fees to LFUSA would be contrary to one of the purposes of ERISA, which is to not discourage employees from filing claims against their employers.

R. 1986.

In the same Post-Trial Findings, the District Court analyzed whether either party was a prevailing party under I.R.C.P. 54(d)(1)(B) and entitled to an award of attorneys' fees and costs. The District Court concluded that LFUSA was the prevailing party under I.R.C.P. 54(d)(1)(B) and entitled to an award of attorneys' fees under Idaho Code § 12-120(3) in the amount of $264,000.00, costs as a matter of right in the amount $15,584.51, and discretionary costs in the amount of $4,880.25. The District Court denied Huber's claim for attorneys' fees or costs. R. 1986. The District Court's grant of attorneys' fees and costs to LFUSA was in error. Likewise, the District Court's denial of attorneys' fees and costs to Huber on the Idaho State law claims is in error.

2. <u>Standard of Review</u>.

The determination of prevailing party status is committed to the sound discretion of the district court and will not be disturbed absence an abuse of discretion. *Oakes v. Boise Heart Clinic Physicians PLLC*, 152 Idaho 540, 542 (2012).

> When examining whether a district court abused its discretion, this Court considers whether the district court: (1) perceived the issue as one of discretion; (2) acted within the outer boundaries of that discretion and consistently within the applicable legal standards; and (3) reached its decision by an exercise of reason. Only in the rarest of circumstances will this Court reverse the district court's determination of which party prevailed.

Oakes at 542 (citations omitted). The court's decision must be consistent with the applicable legal standards, otherwise the court's decision is an abuse of discretion and should be reversed. *Id.*

3. Argument.

At trial, there were two distinct claims pursued by Huber in the litigation (i) Huber's federal ERISA claim governed by federal law; and (ii) Huber's Idaho State law claim, in which Huber alleged that LFUSA breached the terms of the Employment Contract. With regard to the ERISA claim, the District Court determined that neither party was entitled to an award of attorneys' fees and costs. LFUSA has not appealed the District Court's denial of attorneys' fees or costs under ERISA.

The issue here is with the District Court's analysis that LFUSA was the prevailing party under I.R.C.P. 54(d)(1)(B) and the District Court's award of attorneys' fees and costs to LFUSA under Idaho Code § 12-120(3) and I.R.C.P. 54. In its Post-Trial Findings, the District Court reasoned that Huber proved LFUSA breached the Employment Contract and had prevailed on a motion *in limine* to exclude testimony offered by LFUSA's alleged expert, Tresa Ball. R. 1983. The District Court also reasoned that LFUSA proved Huber was not entitled to relief under the CSO (the ERISA plan); that the amount of money awarded to Huber under the State law claim of $180,000.00 was very small compared to the relief Huber sought under the federal ERISA claim (*i.e.,* $3,496,000.00); that the trial revolved around whether Huber was terminated for unsatisfactory performance (which was an issue relative to both the State law claim and the ERISA claim); and, that LFUSA had proved that the CSO was a "top hat plan" and Huber had been terminated for unsatisfactory performance under the CSO (both ERISA issues). *Id.* The Judge determined the ERISA issues to be the "heart" of the case and that LFUSA had prevailed on those issues. *Id.* The District Court concluded LFUSA was the prevailing party under I.R.C.P. 54 and entitled to an award of attorneys' fees under Idaho Code § 12-120(3).

On February 4, 2014, Huber moved the District Court to reconsider its decision to award attorneys' fees and costs to LFUSA based on Ninth Circuit authority holding that work done in an underlying ERISA action (in which fees and costs were not awarded) cannot be used to grant a defendant attorneys' fees and costs under state law. *San Francisco Culinary, Bartenders & Service Employees Welfare Fund v. Lucin,* 76 F.3d 295 (9th Cir. 1996). The District Court denied Huber's motion. R. 2038.

(a) The Outcome of Huber's ERISA/CSO Claim Cannot Be Considered When Determining the Prevailing Party Under I.R.C.P. 54(d)(1)(B).

I.R.C.P. 54(d)(1)(B) is inapplicable to an ERISA claim given the complete and absolute preemption of state law by ERISA. Where a district court is presented with an ERISA claim, the only applicable attorneys' fees and costs statute is 29 U.S.C. § 1132(g)(1), which provides that "the court in its discretion may allow a reasonable attorney's fees and costs of action to either party." *See Cocky v. Life Ins. Co. of N. America*, 804 F.Supp. 1571, 1576 (S.D.GA. 1992).

The case of *Lucin* is instructive. In *Lucin*, the plaintiffs brought an action under ERISA and the Labor Management Relations Act of 1947 ("LMRA"). 76 F.3d at 296. Utilizing state law, the trial court granted plaintiffs a writ of attachment on funds held in an escrow account for defendant. *Id.* The defendant successfully defended against the ERISA and LMRA claims, but its claim for attorneys' fees and costs under ERISA was denied. *Id.* The Ninth Circuit Court of Appeals affirmed the denial of fees and costs. *Id.* After the Ninth Circuit issued its decision, defendant sought and received a judgment against plaintiff under state law for a wrongful attachment. *Id.* at 296-297. The trial court then awarded the defendant attorneys' fees and costs; the trial court "included in its attorneys' fees calculation the amount of fees attributable to the [defendant's] successful effort to defeat the ERISA action." *Id.* at 297. The plaintiffs appealed the fees and costs award on the basis of ERISA preemption. *Id.* The Ninth Circuit agreed with the plaintiffs and reversed the fee award. *Id.* The Ninth Circuit stated: "ERISA preempts an award of attorneys' fees for work done in an ERISA action when those fees are determined according to the standards of a state statute and the state standards differ from the standards that are applicable under ERISA." *Id.* The Court held that:

> Our *Hummell* decision set forth the standards governing the award of fees in [ERISA litigation]. ***No state statute or state rule of law can vary those standards. Therefore, the district court's decision to apply a state statute and grant the defendant's attorneys' fees for work done in the underlying ERISA action notwithstanding the fact that both the district judge and this court had previously determined that the defendants were not entitled to recover such fees under ERISA <u>cannot stand</u>.***
> . . .
> However, to the extent that state law provides for attorneys' fees ***with respect to a state law action***, ERISA is *not* implicated.

Id. at 298 (emphasis of bold and italics added, emphasis of just italics in original). The Ninth Circuit concluded, "[i]f a litigant were permitted to resort to a state statutory procedure to reach around ERISA's attorneys' fees provisions for fees on an ERISA claim, the purposes of the ERISA provision would be severely undermined." *Id.*

In light of ERISA'S compete preemption, the District Court was required to conduct two separate fee and costs analyses—one for the ERISA claim and one for the Idaho State law claim—without intermingling the facts and outcomes related to each claim. The Idaho Supreme Court has recognized that a district court may conduct a separate fees analysis based upon different claims. *See Ramco v. H-K Contractors, Inc.*, 118 Idaho 108 (1990); *Rockefeller v. Grabow*, 139 Idaho 538 (2003); *Shurtliff v. Northwest Pools, Inc.*, 120 Idaho 263, 269 (Ct.App. 1991).

In this case, despite the ERISA preemption, the District Court's Post-Trial Findings make clear that it considered the issues dealing with the CSO (ERISA) and the outcome of the ERISA claim to conclude LFUSA was the prevailing party under I.R.C.P. 54(d)(1)(B) and awarded LFUSA attorneys' fees and costs for work on the ERISA claim. R. 1983-1984, Post-Trial Findings, pp. 5-8. By considering the issues dealing with the CSO and the outcome of the litigation with regard to the CSO in its prevailing party analysis, the District Court violated ERISA's preemption. The District Court's conclusion that LFUSA was the prevailing party under I.R.C.P. 54(d)(1)(B) was an error of law and an abuse of discretion, and should be reversed.

(b) <u>The Claim Based on the CSO Was a Federal Statutory ERISA Claim—Not a Commercial Transaction Governed by Idaho Code § 12-120(3)</u>.

In addition to fining LFUSA the prevailing party under I.R.C.P. 54(d)(1)(B), the District Court awarded LFUSA attorneys' fees under Idaho Code § 12-120(3) on the basis that the CSO was a "commercial transaction" subject to Idaho Code § 12-120(3). R. 1982. By doing so, the District Court violated the ERISA preemption and abused its discretion. Huber's claim under the CSO was a statutory ERISA claim, ***not*** a commercial transaction under Idaho Code § 12-120(3), and cannot be a basis to award attorneys' fees to LFUSA under Idaho Code § 12-120(3). To do so was an error of law.

(c) Huber Prevailed on the Only State Law Claim Tried and, Therefore, Is the Prevailing Party Under I.R.C.P. 54(d)(1)(B) and Entitled to Attorneys' Fees Under Idaho Code § 12-120(3) and Costs Under I.R.C.P. 54(d)(1)(A).

As noted, it was incumbent upon the District Court to conduct two separate analyses—a federal claim analysis and a State claim analysis. The District Court applied the facts set forth in *Hummell v. S.E. Rykoff & Co.*, 634 F.2d 446, 452 (9^{th} Cir. 1980), to Huber's federal claim, *i.e.*, the CSO claim, and determined that neither party was entitled to costs or attorneys' fees under ERISA. On the other hand, the only State law claim tried was Huber's claim under the Employment Contract and Huber prevailed in total.

When the State claim is analyzed separate from the ERISA claim, as is required, Huber was the prevailing party. Huber's State law claim was for breach of the Employment Contract by LFUSA. The District Court determined that LFUSA breached the Employment Contract by failing to make payments under the Employment Contract and awarded all of the damages requested by Huber and prejudgment interest. Under I.R.C.P. 54(d)(1)(B), Huber was the prevailing party and the District Court's decision to deny Huber his costs and attorneys' fees was an abuse of discretion. This Court should reverse the District Court's finding and hold that, with regard to the State causes of action, Huber was the prevailing party and is entitled to an award of attorneys' fees either under Idaho Code § 45-615 or Idaho Code § 12-120(3).

H. This Court Should Award Huber Attorneys' Fees And Costs On Appeal.

Based upon Idaho Code §§ 12-120(3) and 45-615, 29 U.S.C. § 1132(g)(1), and the factors set forth in *Hummell*, Huber respectfully requests an award of his attorneys' fees and costs on appeal.

IV.
CONCLUSION

Based upon the foregoing, Huber requests this Court find the amount owed by LFUSA under the Employment Contract was "wages" and the amount owed trebled; that this Court reverse the District Court's decision that the CSO was a top hat plan and that Huber's benefits could be forfeited, and remand to the District Court for a determination of the amount owed Huber under the CSO; and that this Court reverse the award of attorneys' fees and costs to LFUSA and grant attorneys' fees and costs to Huber.

RESPECTFULLY SUBMITTED this 24th day of February 2015.

McCONNELL WAGNER SYKES & STACEY PLLC

BY: ______________________
Jeff R. Sykes – Attorneys For
Plaintiff-Appellant Jeffrey E. Huber

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 24th day of February 2015, a true and correct copy of the foregoing document was served by the method indicated below to the following party(ies):

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